RUNNING WATER.

WATER running in a natural stream unrestrained is the property of no one, but a portion of it taken out of the stream and confined in the possession of an individual becomes the taker's private property, and belongs to him while under his possession and control. The law of running water (watercourses) is a development of the rules under which one may take into his own possession and make his private property a portion of the flowing mass which in its natural course and wandering is uncontrolled by man and belongs to no one. There is a large body of law specifying *who* may make this transition and to what limitations they are subject, forming, in the common law, "the law of riparian rights," and in the West, "the law of appropriation." It is our object here, by presentation of authorities, to show that this transition forms the framework of the law of watercourses, but not at all to enter into the rules of "riparian rights" or "appropriation" that have been built around it.

I. THE CORPUS OF RUNNING WATER.

In the Institutes of Justinian it is declared concerning things: "They are the property of some one or no one."[1] As further expressed in the Institutes, "By natural law all these things are common, viz: air, *running water*, the sea and as a consequence the shores of the sea."[2] Commenting on this, Vinnius says: "Things common are such because, while by nature being things every one has use for, they have not, as yet, come into the ownership or control of any one."[3] That is, they are the property of no one, within the first quotation from the Institutes.

This classification of running water with what has been called "the negative community," such as the air, runs through the civil

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[1] "*Vel in nostro patrimonio vel extra nostrum patrimonium.*" As translated in Lux *v.* Haggin, 69 Cal. 315, 10 Pac. 674.

[2] "*Et quidem naturali jure, communia sunt omnia haec; aer et aqua profluens, et mare, et per hoc, littora maris.*" 2 Justinian, Inst., tit. 1, § 1. Mr. Ware (Ware, Roman Water Law) gives chiefly the Pandects, and does not give this passage from the Institutes.

[3] "*Communia sunt quae a natura ad omnium usum prodita, in nullius adhuc ditionem aut dominium pervenerunt.*" Quoted in Mason *v.* Hill, 5 B. & Ad. 1.

law authorities. Vattel says: "There are things which in their own nature cannot be possessed. There are others of which nobody claims the property, and which remain common, as in their primitive state when a nation takes possession of a country; the Roman lawyers called these things *res communes*, things common: such were, with them, the air, the *running water*, the sea, the fish and wild beasts."[1] Puffendorff says: "'T is usual to attribute an exemption from the property to the light and heat of the sun, to the air, to the *running water*, and the like."[2] Grotius[3] classes *aqua profluens* with *res communes*. A modern French work says: "The things which, suited alike to the use of all men, are not susceptible of exclusive possession cannot, on this account, form the object of a right of property. These things, which the Roman law called *res omnium communes*, are the air, the deep sea, and *running water* as such; that is to say, in the sense that one sees it in its state of continual motion and ceaseless change."[4] Likewise the Spanish law, regarding which Esriche says that waters of fountains and springs as they go out from thence "become *running water*, *aqua profluens*, and pertain like common things (*cocas communes*)" etc.[5] In an early English case the civil law authorities are stated as follows: "By the Roman law, *running water*, light, and air were considered as some of those things which had the name of *res communes*, and which were defined 'things the property of which belong to no person,' etc."[6] In a leading English case where the civil law authorities are set forth and examined, the following is given as the Roman law: "No one had any property in the water itself except in that particular portion which he might have abstracted from the stream and of which he had the possession; and during the time of such possession only."[7] The result of these authorities is that the *corpus* of naturally *running water* was classed in the Institutes and civil law writers with the air, and those

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[1] 1 Law of Nations, c. 20; Chitty's translation, 109, § 234.

[2] 4 Puffendorff, c. 5, § 2; and see 3 *ibid.*, c. 3, §§ 3, 4.

[3] Bk. C. 2, § 12.

[4] "Les choses qui, destinées à l'usage commun de tous les hommes, ne sont pas susceptibles de possession exclusive, ne peuvent, par cela même, former l'objet du droit de propriété. Ces choses, que le droit Roman appellait *res omnium communes*, sont l'air, la haut mer, et l'eau courante comme elle; c'est-à-dire en tant qu'on l'envisage dans son état de mobilité continue, et de renouvellement incessant." 2 Aubry et Rau, Droit Civile Français, 4 ed., 34.

[5] Esriche, Aquas.

[6] Liggins *v.* Inge, 7 Bing. 692.

[7] Mason *v.* Hill, 5 B & Ad. 1.

things which cannot be owned while in their natural state and condition, or as they have been called, the "negative community." [1]

There is some variation from this. One variation is in changing *res communes* to *res publicae*. Domat [2] names as *res communes*, the heavens, stars, light, air, sea; as *res publicae*, the rivers, streams, their banks, highways. This variation is again below referred to. Another variation is in changing *aqua profluens* to *rain* water. One writer,[3] commenting on the Institutes, reads *aqua pluvialis* for *profluens*, as among *res communes*, and classes *flumina* with *res publicae*. In another work, *cocas communes* are defined as those "*qui sirven a los hombres y demas vivientes como el aire, el aqua llovediza* (rain water), *el mar y sus riberas*." [4] It is evident that these are corruptions of the Institutes. In addition to the passage above, classing *aqua profluens* with the *res communes*, there is a different passage in the Institutes saying, "*Flumina autem omnia et portus publica sunt*," which has evidently induced some commentators to drop *aqua profluens* out of the *res communes*. Suffice it that the Institutes, with regard to air, running water, wild animals, and the negative community in general, make no distinction between *res communes*, *res publicae*, and *res nullius*: the distinction, when it is made, is the refinement of a few of the later commentators.

This civil law principle, that running water is in the negative community, passed into the common law. As regards a related branch of the law of waters, the law of accretion, it has been expressly said: "Our law may be traced back through Blackstone,[5] Hale,[6] Britton,[7] Fleta,[8] and Bracton [9] to the Institutes of Justinian,[10] from which Bracton evidently took his exposition of the subject." [11] The passage in the Institutes above quoted, classing running water as a substance, with the air, is transcribed by Bracton as the law of England, saying, "*Naturali vero jure communia sunt haec, . . . aqua profluens, aer, et mare, et littora maris, quasi maris accessortia.*" [12]

Fleta says: "*Aliae communes sunt, ut aer, mare, et littora*

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[1] Ohio Oil Co. *v.* Indiana, 177 U. S. 190; 20 Sup. Ct. Rep. 576; 44 L. ed. 729.
[2] Liv. prelim. tit. 3, s. 1, p. 16.
[3] 2 Nicasius, tit. 1, 89 b.
[4] Febrero Novissimo, T. 1, lib. 2, tit. 1; Lux *v.* Haggin, 69 Cal. 316; 10 Pac. 674.
[5] 2 Com., c. 16, pp. 261, 262.
[6] De Jure Maris, cc. 1, 6.
[7] II, c. 2. [8] III, c. 2, § 6 *et seq.* [9] II, c. 2.
[10] II, 1, 20. [11] Lindley, L. J., in Foster *v.* Wright, 4 C. P. D. 438.
[12] Bracton, II, f. 7, pl. 5.

maris; aliae publicae, ut jus piscandi, et applicandi fulmina et portus."[1] Lord Denman, in Mason *v.* Hill,[2] says: "It is worthy of remark that Fleta, enumerating the *res communes*, omits '*aqua profluens.*'" The same may be said of Britton[3] declaring, "Some things are common, as the sea, the air, and the seashore, and as the right of fishing in tidal waters and in the sea and in common waters and rivers"; though in a later section[4] he includes wild animals among the things common, and he also classes rivers, like Fleta, as among things public instead of common. Perhaps some light upon this omission of *aqua profluens* from things common in Fleta and Britton is thrown by Professor Maitland's commentary upon Bracton in the publications of the Selden Society. According to Professor Maitland, Bracton is substantially a mere copy of the work of an Italian commentator upon the Institutes of Justinian, —a jurist of Bologna, named Azo, of great reputation in Bracton's time. In commenting upon the Institutes regarding *res communes*, Azo questions (but merely by way of query) whether there may not be a distinction between things common and things public, though the Institutes do not so distinguish. Bracton proceeded to adopt the distinction in general terms, not, however, applying it to *aqua profluens*, which he leaves as in the Institutes. It may be, then, that Fleta and Britton are influenced by Bracton and carry the distinction into actual application, and having put *flumina* into *res publicae*, feel a necessity then to omit *aqua profluens* from *res communes*. It is the same corruption as that above noted in some of the civil law writers.

The classification of running water with the air is, however, again taken up by another of the older writers, frequently referred to in the English reports.[5] He finds the civil law rule in conflict with the maxim, "*cujus est solum, ejus est usque ad caelum.*" Callis says: "It may here, as I take it, be moved for an apt question, in whom the property of running waters was.[6] In my conceit, the civil law makes prettier and neater distinctions of those than our common law doth; for there it is said that '*naturali ratione quaedam sunt communia, ut aer, aqua profluens, mare, et littora maris.*'

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[1] Fleta, lib. 3, cap. 1, § 4.

[2] 5 B. & Ad. 1.

[3] II, c. 2, § 1; Nicholas' translation, p. 175.

[4] § 3.

[5] Callis, Sewers, original ed., 78, quoted in Medway, etc., Co. *v.* Romney, 9 C. B. N. S. 587. "Sewer" anciently signified small streams and brooks of fresh water.

[6] Citing Natura Breva, f. 123; and Pl. Com. 154; and Y. B. 12 Hen. VII, f. 4, as recognizing a plaintiff as having property in the water as well as the soil.

I concur in opinion with them, that the air is common to all; and I hold my former definitions touching the properties of the sea and the seashores. But that there should be a property fixed in running waters, I cannot be drawn to that opinion; for the civil law saith further, '*quod aqua profluens non manet in certo loco, sed procul fuit extra ditionem ejus quod flumen est ut ad mare tandem perveniat*'; for in my opinion, it should be strange the law of property should be fixed upon such uncertainties as to be altered into *meum, tuum, suum,* before these words can be spoken, and to be changed in every twinkling of an eye, and to be more uncertain in the proprietor than a chameleon of his colours." This is the first express recognition the writer has discovered, of the conflict between this principle and the maxim "*cujus est solum.*"[1]

The writer has not, with the facilities at his disposal, been able to learn the date of Callis's book, but believes that it is older than what is, perhaps, the next authority in chronological order, the case of Shury *v.* Piggott (1625).[2] In this case (among many things said) *aqua profluens* was compared to the air, which "*aut invenit, aut facit viam,*" and it was also said, "The same (the watercourse) being a thing which arises out of the land, *but no interest at all by this claimed in the land,* but *quod currere solebat* in this way, and so to have continuance of this."[3]

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[1] Lord Coke says: "Land in legal signification comprehendeth any ground, soil or earth whatsoever, as meadows, pastures, woods, moors, waters, marshes, furses and heath," discussing the meaning of "land," adding in the same note: "Also the waters that yield fish for the food and sustenance of man are not by that name demandable in a *praecipe;* but the land whereupon the water floweth or standeth is demandable, as, for example, *viginti acras terrae aqua coöpertas.* And lastly the earth hath in law a great extent upwards, not only of water, as hath been said, but of *aere* and all other things even up to heaven; for *cujus est solum ejus est usque ad caelum,* as is holden in 14 Hen. 8, fo. 12; 22 Hen. 6, 59; 10 Edw. 4, 14." Co. Litt., lib. cap. 1, §§ 1, 4a. See 2 Bl. Com. 18. That the law, while applying this maxim to percolating water, does not follow it as to running water, will appear further as our discussion proceeds. We take this occasion, however, to refer especially to Lyon *v.* Fishmongers Company, 1 App. Cas. 673; Lord *v.* Commissioners, 12 Moore P. C. 473; North Shore Ry. *v.* Pion, 14 App. Cas. 612, 621; White *v.* White, [1906] A. C. 83; Justice Story in Slack *v.* Walcott, 3 Mas. (U. S.) 508; Fed. Cas. No. 12932; Webb *v.* Portland Cement Co., 3 Sumn. (U. S.) 189; Fed. Cas. No. 17322; Haupt's Appeal, 125 Pa. St. 211, 17 Atl. 436; 3 L. R. A. 536; Moulton *v.* Newburyport, etc., Co., 137 Mass. 163; Bigham *v.* Port Arthur, etc., Co., 91 S. W. 848 (Tex., Civ. App.); City of Paterson *v.* East Jersey W. Co., 70 Atl. 472 (N. J. Eq.); Lux *v.* Haggin, 69 Cal. 255, 413, 10 Pac. 674; Heilbron *v.* Fowler, etc., Co., 75 Cal. 426; 7 Am. St. 183, 17 Pac. 535; Goodwin, Real Property, 2; 19 HARV. L. REV. 216, n.; and the authorities herein below cited. The writer has given some degree of attention to the point in Water Rights in the Western States, 2 ed., Part II, Ch. II.

[2] 3 Bulst. 339.

[3] Jones, J., in Shury *v.* Piggott, 3 Bulst. 340.

The case seems to have excited a good deal of attention at the time, being given in six different reports[1] and has been said to have discussed collaterally many things which were not necessary to the decision.[2] Lord Blackburn declares the stream in question appears to have been in reality an artificial one; though the maxim "*aqua currit et debet currere ut currere solebat*," as a rule of natural streams, probably rests upon this case. If, however, Lord Blackburn is correct in saying it was an artificial stream, it shows that this maxim really arose as a statement that the right to running water rests on prescription; and there is enough in the reports of other cases to show that such is the real origin of the maxim. We take this occasion to digress here and call attention to this.

The case discussed the matter from the view of formal pleading, as cases were usually treated at that time. The plaintiff declared, in the words of pleading on ancient custom, that the water "*currere solebat et consuevit*" to his land, and one of the judges rested his decision on the ground that, as he said, "*consuevit* is a good word for a custom." That the words of the maxim arose from this idea of resting the right to watercourses upon prescription or custom from time out of mind, appears in numerous other of the older authorities succeeding this case. In one it was held, "By reason of the words *consuevit et debuit* it must be intended that a prescription was given in evidence."[3] In another, it was said "*Currere consuevit* had been held well enough in case of a watercourse, because that must be time immemorial;"[4] in another, "If I have a right from usage as *currere solebat*, I have the right in such manner as the usage has been."[5] There is another instructive case reported in several reports.[6] In this case plaintiff declared, among other words, that the water "*currere consuevit et debuit* to a mill of the plaintiff,"[7] which was held a sufficient pleading both below and on appeal. The watercourse was an artificial one.[8] In

[1] Palmer 444, Popham 169, 3 Bulstrode 339, Noy 84, Latch 153, W. Jones 145.

[2] Lord Blackburn in Dalton *v.* Angus, 6 App. Cas. 825.

[3] Rosewell *v.* Prior, 1 Ld. Raym. 392.

[4] Powell, J., in Tenant *v.* Goldwin, 2 Ld. Raym. 1089, 1094.

[5] Brown *v.* Best, 1 Wils. 174.

[6] Palmer *v.* Kebelthwaite, 1 Show. 64, Skinner 65. In Mason *v.* Hill, 5 B. & Ad. 1, Lord Denman speaks of these two reports of the case, and says: "The final result of the case does not appear in the books, and the roll has been searched for it in vain," but the report of it on appeal appears in four different reports, viz.: Skinner, 175, Carth. 85, 3 Mod. 48, Holt 5. See also 3 Lev. 133.

[7] 1 Show. 64. [8] Carth. 85.

support of the pleading, plaintiff's counsel argued among other things, that "The words *ab antiquo et solito curso* amount to as much as if it had been said *de jure currere debuisset et consuevit*," and the report says[1] "The judgment was affirmed, but Holt, C. J., said, that if the cause had been tried before him, the plaintiff should have proved his mill to be an ancient mill, otherwise he should have been nonsuit," showing that the words *consuevit et debuit* were taken by Holt as referring to prescription. In another report of the same appeal[2] plaintiff's counsel speaks of certain cases as "those cases are wherein the plaintiff declared that the water *currere consuevit et debuisset* to the plaintiff's mill time out of mind; which words are of the same significance as if he had showed it to be an ancient mill. . . . The word *solet* implies antiquity . . . and it was the opinion of a learned judge[3] that the words *currere consuevit et solebat* did supply a prescription or custom." The report says, "The word *solet* implies antiquity and will amount to a prescription," adding the expression of Holt, C. J., given above to this effect, whereby he must have meant that, since the pleading was based on prescription, it could only be supported on the trial by proof that the use was in fact ancient, which the words *currere consuevit debuit* or *solebat* must be taken as having alleged. These cases show that the common law of watercourses was at one time based on an analogy to prescription or ancient custom, and that the maxim "*aqua currit et debet currere ut currere solebat*" is merely a survival of this stage of the law; a stage now, of course, long discarded, though the maxim has survived.[4]

With this digression, we return again to the main discussion. The peculiar nature of running water was referred to in one of the old cases holding that ejectment would not lie for a watercourse; that livery could not be made of it, "for *non moratur*, but is ever flowing," and comparing running water to the water in the sea.[5]

[1] Carth. 85. [2] 3 Mod. 48.

[3] Citing Doderidge, J., in Shury *v.* Piggott, Poph. 171, above quoted.

[4] "We may consider therefore, that this proposition is indisputable; that the right of the proprietor to the enjoyment of a watercourse on the surface is a natural right, and not acquired by occupation of the stream itself, *or presumed grant*." Lord Wensleydale in Chasemore *v.* Richards, 7 H. L. Cas. 349. See also Dickinson *v.* Canal Co., 7 Exch. 299; Magistrates *v.* Elphinstone, 3 Kames Dec. 332 (Scotch), saying "This right he has from the law of nature, *without the aid of prescription*." See also Countess of Rutland *v.* Bowler, Palmer 290; Prickman *v.* Tripp, Skin. 389, Comb. 231; Acton *v.* Blundell, 12 M. & W. 324; Cox *v.* Matthews, 1 Vent. 237; The King *v.* Directors of Bristol, etc., Co., 12 East 429.

[5] Chancellor *v.* Thomas, Yelv. 143.

Blackstone contains several emphatic statements of the principle, laying it down as the settled law of England. He says: "But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common. . . . Such (among others) are the elements of light, air and water," and he also speaks of "the very elements of fire or light, of air and of water. A man can have no absolute permanent property in these, as he may in the earth and land, since these are of a vague and fugitive nature;" and again: "For water is a movable, wandering thing, and must of necessity continue common by the law of nature."[1]

The beginning of the nineteenth century saw a re-examination into the nature of rights in running water. In 1805, in Bealey *v.* Shaw,[2] Lord Ellenborough laid down the right, but without discussing the foundation of it.[3] In 1824, however, in Williams *v.* Moreland[4] appear the expressions, "Flowing water is originally *publici juris*," and "running water is not, in its nature, private property," and in 1831, in Liggins *v.* Inge,[5] "Water flowing in a stream, it is well settled by the law of England, is *publici juris*. By the Roman law, running water, light and air were considered as some of those things which had the name of *res communes*, and which were defined 'things the property of which belong to no person,'" etc. In Wright *v.* Howard,[6] it was said of a stream, "there is no property in the water."

We reach now the authorities upon which the modern law of watercourses rests. In Mason *v.* Hill,[7] decided in 1833, Lord Denman elaborately considered the attitude of the law towards running water, with the intention expressed, "to discuss, and, so far as we are able, to settle the principle upon which rights of this nature depend," and this case has been generally accepted as accomplishing this result, settling the common law of watercourses in its present form.[8] Lord Denman quotes at length from the civil law, and says concerning it: "No one had any property in the water itself except in that particular portion which he might have

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[1] 2 Bl. Com. 14, 18, 395.

[2] 6 East 208.

[3] In 12 East 429, he says the right rests on prescription.

[4] 2 B. & C. 910.

[5] 7 Bing. 692.

[6] 1 Sim. & St. 190.

[7] 5 B. & Ad. 1.

[8] See to this effect regarding Mason *v.* Hill, *supra;* Cocker *v.* Cowper, 5 Tyrw. 103; Embrey *v.* Owen, 6 Exch. 352; Stockport W. W. *v.* Potter, 3 H. & C. 323; McGlone *v.* Smith, L. R. 22 Ir. 568; Lord Blackburn in Orr Ewing *v.* Colquhoun, 2 App. Cas. 854; Gale, Easements, 8 ed. (1908), 258.

abstracted from the stream and of which he had the possession, and during the time of such possession only," and says that the expressions in Blackstone and the common law cases just quoted calling running water *publici juris*, simply adopted into the common law this principle that the water itself was not the subject of private ownership.

This was followed very explicitly in the succeeding English cases. In one[1] it was said, "Flowing water, as well as light and air, are in one sense '*publici juris*.' They are a boon from Providence to all and differ in their mode of enjoyment. Light and air are diffused in all directions, flowing water in some." And in the classical case of Embrey *v.* Owen,[2] this finds what may be called its crystallized expression in the English reports. In this case Baron Parke (who had also taken part in the judgment in Mason *v.* Hill) said: "Flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only: that all may reasonably use it who have a right of access to it; that *none can have any property in the water itself*, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it." As late as the 1906 Appeal Cases the Chancellor said that running water is *publici juris*, and a claim to ownership of the *corpus* of the water of a stream was said by another of the Lords to be "opposed to elementary ideas about the water of a river," and "repugnant to the general law of rivers."[3]

In American cases the doctrine is announced. For example, it is laid down in the very earliest Pennsylvania and Connecticut reports. Referring to the authorities, Gibson, C. J., says:[4] "They establish that the use of water, flowing in its natural channel, like the use of heat, light or air, has been held by every civilized nation, from the earliest times, to be common by the law of nature; and not merely public, like the use of a river or a port, which is subject to municipal regulation by the law of the place. They establish, also, that the domestic uses of water are its natural and

[1] Wood *v.* Waud, 3 Exch. 748.
[2] 6 Exch. 355.
[3] White *v.* White, [1906] A. C. 83.
[4] Mayor *v.* Commissioners, 7 Pa. St. 363.

primary ones. Air is not more indispensable to the support of animal or vegetable life. Water is borne by the air, in the form of vapor, to the remotest regions of the earth, for the free use and common refreshment of mankind; and to interdict the use of the one within any given locality, would be as monstrous and subversive of the scheme of animal existence, as it would be to interdict the use of the other. It is only when it has been received on the surface of the earth, not while it is falling from the clouds, that it can be made to minister to the ordinary wants of life; and if it be common at first, it must continue to be so while it is returning, by its natural channels, to the ocean. No one, therefore, can have an exclusive right to the aggregate drops that compose the mass thus flowing, without contravening one of the most peremptory laws of nature. Water may be exclusively appropriated by being separated from the mass of the stream, and confined in tanks or trunks, but then it would have ceased to be *aqua profluens*." And he adds that a grant of water power " is not a grant of property in the *corpus* of the water as a chattel." [1]

Numerous other authorities to this same effect appear later in this discussion; but we trust we have given enough to show, for the present, the attitude of the law that running water, unrestrained in its natural course, belongs to the negative community and is nobody's property; its particles or aggregate drops, in specie or as a substance, being outside the domain of what can constitute property; just as no one can be said to own the air, the sea water, the rain or the clouds or the moon or stars, or the pearl at the bottom of the sea, the wild animals in the forest, or the very fish swimming at large in the running stream itself. Like all these things, running water is a substance wandering at large, obeying its own will and ever changing its form and position, uncontrolled by man, and with them, moves in the negative community. This has been the prevailing attitude of the law from Roman times to the present day, as will appear even more strongly as the discussion proceeds.

II. The Usufruct.

While the *corpus* of naturally running water is thus in the negative community and not the subject of private ownership, the law recognizes nevertheless a very substantial right in its use and flow, — the right to have the liquid flow and to use it, which the law calls

[1] And see Mitchell *v.* Warner, 5 Conn. 519.

the "usufructuary right," or the "water right." The law of watercourses consists of the rules governing this right of flow and use. We do not stop long over this, merely giving authorities to show the distinction between the usufruct and the water itself.

There is in the civil law a large body of law known as the law of the "usufruct."[1] One civil law writer says, continuing a passage quoted above:[2] "Though not susceptible of being property, things of this nature [the negative community] do not the less fall within the province of the law, for the regulation of their *use*, which is not absolutely abandoned to the caprice of all."[3] Puffendorff, speaking of the air, one member of the negative community, says: "So, though no one will pretend to fix a property in the wind, yet we may appoint a service or duty of not intercepting the wind to the prejudice of our mills."[4] Another civil law authority,[5] speaking of a riparian proprietor owning both banks of a stream, says of the water: "It is not his own as to property, but only as to the use which he can make of it in its passage."

In the old case of Shury *v.* Piggott, we recall the passages already quoted,[6] where it is said that *aqua profluens* is in a class with the air, and man's right therein includes no interest in the land but only a right to the continuance of the *flow*. Blackstone says: "For water is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient *usufructuary* property therein."[7] One well-known English case says: "The property in the water itself was not in the proprietor of the land through which it passes, but only the *use* of it, as it passes along, for the enjoyment of his property, and as incidental to it."[8] The classical English expression is in Embrey *v.* Owen,[9] saying, as already quoted,[10] that flowing water is *publici juris*, in which, itself, none can have any property, but may have a right to reasonably use it. "Each proprietor of the adjacent land has the right to the *usufruct* of the stream which flows through it," the right to the

[1] 1 Inst., tit. IV, V; 7 Pandects. See Noodt's "De Usufructu," opp. tom. 1, pp. 387-478.

[2] P. 191, *supra*.

[3] "Quoique non susceptibles de propriété, les choses de cette nature n'en tombent pas moins sous l'empire du Droit pour le règlement de leur usage, qui n'est pas, d'une manière absolue, abandonné à la discrétion de tous." 2 Aubry & Rau, Droit Civile Français, 4 ed., 35, citing Code Napoleon, § 714.

[4] 4 Puffendorff, c. 5, § 2.

[5] Hall, Mexican Law, § 1392.

[6] P. 194, *supra*.

[7] 2 Bl. Com. 18.

[8] Wood *v.* Waud, 3 Exch. 775, citing Story and Kent.

[9] 6 Exch. 352.

[10] P. 198, *supra*.

benefit and advantage of the water as it flows past. Another English case says: "All that a riparian proprietor is entitled to is *flumen aquae;* but no atom of the water belongs exclusively to him."[1]

In the American cases the same doctrine is just as firmly laid down. Mr. Justice Story says:[2] "But, strictly speaking, he has no property in the water itself, but a simple use of it as it passes along." And Kent:[3] "He has no property in the water itself but a simple usufruct as it passes along." In a New York case it is said:[4] "Another maxim, flowing from the one above stated [*aqua currit*] is, that the owner of the bed of the stream does not own the water, but he only has a mere right to its use; he has a mere usufruct."

The California court has laid this down in many cases. In the very earliest case upon the subject it is said: "It is laid down by our law writers that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage of its use."[5] In Lux *v.* Haggin[6] the court elaborately reviewed the entire law of waters, and this is there laid down: "As to the nature of the right of the riparian owner in the water, by all the modern as well as ancient authorities the right in the water is *usufructuary* and consists not so much in the fluid itself as in its uses." Many other California cases, hereafter cited, lay this down, and so do the other Western courts, such as, for example, the Nebraska court, saying: "The law does not recognize a riparian property right in the *corpus* of the water. The riparian proprietor does not own the water. He has the right only to enjoy the advantage of a reasonable use of the stream as it flows through the land, subject to a like right belonging to all other riparian proprietors."[7]

This principle of a private right in the use as distinguished from the substance itself is taken from the law of "usufruct" in the Institutes,[8] and is well recognized today. This usufructuary right, or "water right," is the substantial right with regard to flowing waters; is the right which is almost invariably the subject-matter

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[1] Earl, C. J., in Medway Co. *v.* Romney, 9 C. B. N. S. 586.

[2] Tyler *v.* Wilkinson, 4 Mas. (U. S.) 397.

[3] 3 Com. Marg. 439.

[4] Pixley *v.* Clark, 35 N. Y. 520, 91 Am. Dec. 71 (1866).

[5] Eddy *v.* Simpson, 3 Cal. 249, 58 Am. Dec. 408. See also Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472.

[6] 69 Cal. 255, 10 Pac. 674.

[7] Crawford, etc., Co. *v.* Hathaway, 67 Neb. 325, 93 N. W. 781, 108 Am. St. Rep. 647, 60 L. R. A. 889.

[8] *Supra.*

over which irrigation, or water power, or similar contracts are made and litigation arises, and is real property.

The law on our subject, then (borrowing from the civil law), is but a development of the exercise of this usufructuary right, and of the severance in pursuance of it of a portion of the water from the natural stream. The water in the stream itself is nobody's property. The right (called "usufructuary") may exist to take of it and to have it flow to the taker for his use. The part taken in the fulfilment of this usufructuary right is the private property of the taker while in his possession, and it is to this proposition that we now proceed.

III. Severed Water.

The development of the law of running waters carries the foregoing to its conclusion, whereby the stream water, which while in the stream is not a substance the subject of property, finally passes into private ownership. This occurs when some portion of it is taken out of its natural course, severed from the stream, and reduced to possession. A water right is a usufruct in the stream, consisting in the right to have the water flow so that some portion of it (which portion the law limits in various ways) may be reduced to possession and made the private property of an individual.

In the civil law it is said: "Upon these principles, running waters are held by the Roman *juris-consulti* to be common to all men. But it also follows that this decision does not apply to waters, the appropriation of which (to the exclusion of the common enjoyment) is necessary for a certain purpose, as water included in a pipe or other vessel for certain uses."[1] And commenting upon a passage in the Institutes, a Scotch case says: "*Water drawn from a river into vessels or into ponds becomes private property.*"[2] No one owns the air, but the inventor who liquefies it owns so much as is liquid in his laboratory: it is his private property while in his possession.

The common law is stated in identical terms. "None can have any property in the water itself, *except in the particular portion which he may choose to abstract from the stream* and take into his

[1] Bowyer, Commentaries on Civil Law, 61.

[2] Adding, "but to admit of such property with respect to the river itself, considered as a complex body, would be inconsistent with the public interest, by putting it in the power of one man to lay waste a whole country." Magistrates *v.* Elphinstone, 3 Kames, Dec. 331 (Scotch).

possession, and that during the time of his possession only."[1] In a well-known case in the House of Lords[2] it is said that no one can have any property in the running water of the stream, "which can only be *appropriated by severance*, and which may be lawfully so appropriated by every one having a right of access to it" (the riparian proprietors). Lord Campbell declared[3] that water in a cistern is private property; and in a very recent case in the House of Lords the Chancellor said that water in an artificial pond is "water with somewhat of a proprietary right."[4]

In a New York case it is laid down: "Water, when reduced to possession, is property, and it may be bought and sold and have a market value, but it must be in actual possession, subject to control and management. Running water in natural streams is not property and never was."[5] The California Court very clearly expressed the theory of the law when, in words similar to those of the House of Lords above quoted,[6] it said: "He does not own the *corpus* of the water, but incident to his riparian ownership is the right to appropriate a certain portion of it. It is only, I think, by some species of appropriation that one can ever be said to have title to the *corpus* of the water."[7]

he nature of the right existing in naturally running water is thus that of having it flow and of taking it into possession by diverting it into artificial structures, ditches, reservoirs, cisterns, canals, pipes, and the like, thereby making private property of a part of it during the time it is held in possession and control. Being naturally a member of the negative community, the law recognizes only a right to use and take of it, and to have it flow to the taker so that it may be used and taken (a usufructuary right); but when taken from its natural stream, so much of the

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[1] Embrey *v.* Owen, 6 Exch. 352; Mason *v.* Hill, 5 B. & Ad. 1.

[2] Lyon *v.* Fishmongers Co., 1 App. Cas. 673.

[3] Race *v.* Ward, 3 E. & B. 710.

[4] Lord Halsbury in White *v.* White, [1906] A. C. 84.

[5] But adding that building a dam across a river so as to form a reservoir is not reducing it to possession. City of Syracuse *v.* Stacey, 169 N. Y. 231, 245, 62 N. E. 354, 355.

[6] Lyon *v.* Fishmongers Co., *supra.*

[7] Vernon Irr. Co. *v.* Los Angeles, 166 Cal. 237, 39 Pac. 762. One general authority says: "Ownership of water in canal: The water in a canal is the sole property of the canal owners." 5 Am. & Eng. Ency. L. 113. The right to take water out of another's pond is a profit *à prendre.* Angell, Watercourses, 7 ed., 245; Hill *v.* Lord, 48 Me. 83, dictum. But not so of the right to take water from his spring. Race *v.* Ward, 3 E. & B. 710.

substance as is actually taken is severed from the negative community, and, passing under private possession and control, becomes private property during the period of possession and control. The *corpus* of the water severed from the stream in a reservoir or ditch or other artificial receptacle is private property as a commodity; it ceases to be without ownership, but is "water with somewhat of a proprietary right."

In the negative community there is a still more familiar member, namely, animals *ferae naturae*, with which, also, running water has been compared, even so far as to name it accordingly a "mineral *ferae naturae*," and which likewise become private property by capture.

In the first place, wild animals are, by settled law, members of the negative community; they are nobody's property while wandering at large; and, in the next place, we find running water compared to animals *ferae naturae* ever since the Institutes. In the Institutes the law of wild animals follows under the same title as that above quoted concerning *aqua profluens*, thus: "*Likewise* wild animals, birds, and fishes, since before capture belonging to no one, after capture belong to him who captures them."[1] Vattel[2] gives together as the things of which no one claims the property, "the air, the *running water*, the sea, *the fish and wild beasts*." Vinnius, in commenting on the Institutes,[3] says fish are among the things common while in the ocean, but cease to be such the moment they are caught.

Following the particles of the liquid from the stream into a ditch into which they have been diverted, there then has come a change in the "wandering" of the liquid that has been taken into the ditch. It is like the change brought about when wild birds are caught in a snare, wild animals caged, fish caught in nets. Before capture none of these are regarded as property, real or personal, being wandering, ownerless things, but after capture they become the private property of the taker. While swimming in the stream, the fish in the water are no more the subject of private ownership than the water they swim in, and, though

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[1] 2 Inst., tit. 1, § 12. "*Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra, mari, caelo nascuntur simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt: quod enim ante nullius est, id naturali ratione occupantis conceditur.*"

[2] P. 191, *supra*.

[3] 2 Inst., tit. 1, § 1.

one may own the usufructuary right of fishing, nobody owns the fish themselves;[1] but the fisherman owns them when caught in a net.[2] So the particles of water that have passed into private control in a reservoir, ditch, or other artificial structure, have been taken from their natural haunts, so to speak, and captured. This comparison was made by Field, J., with regard to the water in the reservoirs of the Spring Valley Water Company, which supplies San Francisco.[3] Chancellor Kent says: "The elements of air, light, and water are the subjects of qualified property by occupancy," and then, in the same paragraph, proceeds to the law of wild animals, as being based on the same principle.[4] The leading authority in the common law for this comparison is Blackstone, who says: "But, after all, there are some few things which, notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an *usufructuary* property is capable of being had; and, therefore, they belong to the first occupant during the time he holds possession of them and no longer. Such (among others) are the elements of light, air, and water, which a man may occupy by means of his windows, his gardens, his mills, and other conveniences; such also are the generality of those animals which are said to be *ferae naturae*, or of a wild, untamable disposition, which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterward."[5]

To avoid misunderstanding, it must be well noted that this passage distinguishes the *corpus* of water from the usufructuary right in the stream, and that when Blackstone here says that every man has an equal right to seize and enjoy, he is referring to the particles or drops, which no man can trace or identify as having been formerly in his possession, and which consequently he can lay no claim to

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[1] People *v.* Truckee, etc., Co., 116 Cal. 397, 58 Am. St. 183, 39 L. R. A. 581, 48 Pac. 374; *Ex parte* Maier, 103 Cal. 476, 42 Am. St. 129, 37 Pac. 402.

[2] Young *v.* Hichens, 6 Q. B. 606, 51 Eng. Com. L. 606.

[3] Spring Valley W. W. *v.* Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, 28 L. Ed. at p. 183, Field, J., *arguendo.*

[4] Kent, Commentaries, Part V, c. 35, p. 347.

[5] 2 Bl. Com. 14. See also pp. 18, 395.

because of such former possession. Instead, any one to whom the escaped or abandoned particles come may seize and use them in the same manner as any other particles, and under the same considerations as govern his right to such other. The escaped or abandoned particles pass under any usufruct that may exist in the stream they have mixed with, be the owners of that usufruct who they may, and without, for the present purpose, specifying who the owners of the usufruct may be. The statement applies only to the *corpus* of the water (the ownership of the usufruct has been evolved into the law of riparian rights, or, in the West, into the law of appropriation), and shows how the *corpus* is not the subject of property while flowing naturally; is private property during capture; and again ceases to be property when possession ceases (property in the *corpus* being lost by the escape of water or its abandonment, whereupon the particles again cease to be property, and are again nobody's property, completing the cycle).

This analogy of *running water* to animals *ferae naturae* is complete, from the days of the Roman law to our own time. The analogy does not, of course, exist to the same extent to percolating water, because in Acton *v.* Blundell[1] a distinction was made between the two. A different rule of ownership, the *cujus est solum* doctrine, was applied to percolating water, whereby, even in its natural state, it is the private property (real property) of the landowner in whose land it exists. This is the great difference in the attitude of the law toward percolating water and the running water of streams.[2] There is to-day, however, a tendency to abandon this rule of Acton *v.* Blundell,[3] and thus to class all water, percolating as well as running, as a "mineral *ferae naturae*." Some authorities, thus merging the different kinds of water, are stated and reviewed by the Supreme Court of the United States in Ohio Oil Co. *v.* Indiana.[4] This is, of course, a fundamental departure as regards percolating water, and the court did not go the whole length of putting it absolutely, like running water, into the negative commu-

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[1] 12 M. & W. 324.

[2] "There is only one case in law in which water in its natural state is the subject of ownership, and that is the case of percolating water. A man is regarded as owning the percolating water while it is in the land. But other water in its natural state is subject only to the use of the man through whose land it flows. He had a right to use but is not regarded as having the title." Goodwin, Real Prop., 2.

[3] The writer has collected most of the recent cases in Water Rights in the Western States, 2 ed., 578.

[4] 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729.

nity. The *cujus est solum* doctrine withheld the court somewhat, and it said the analogy as to percolating water is not complete. In reading this opinion, it must be borne in mind that the court's hesitation has reference solely to percolating water, concerning which the analogy is a very recent departure or "new rule," and involves the rejection of Acton *v.* Blundell.

The case dealt with natural gas, to which the court also tentatively applied the principle, speaking of percolating water only as an analogy; classing natural gas, oil, and percolating water together as "minerals *ferae naturae*," but with some hesitation, induced by the *cujus est solum* doctrine which has hitherto applied to them in contrast to *running water*. Mr. Justice White, delivering the opinion, said these have no fixed *situs*, but, on the contrary, have the power, as it were, of self-transmission, and are of a peculiar character. He recognizes that the *cujus est solum* doctrine makes them the landowner's property, and yet says that cannot absolutely be, but that property can be based in them only when subject to control, as in a well, for example. When they escape or come under another's control the title of the former is gone. He quotes with approval a Pennsylvania case wherein it is said that while these things are minerals, they are minerals with peculiar attributes.[1] Other cases are cited in which the phrase "mineral *ferae naturae*" is used. Only when reduced to actual possession do they become the subject of ownership, and then they are like any other property, the subject of ordinary commerce.[2] Mr. Justice White says the landowner has the right on his land to bore wells and otherwise seek to acquire these things, but that "until these substances are actually reduced by him to possession, he has no title whatever to them as owner," and uses the expression that "things which are *ferae naturae* belong to the 'negative community.'" Proceeding to a conclusion, however, regarding natural gas, with which the case dealt, he cannot consider the analogy complete. This is because of the conflict with the *cujus est solum* doctrine, which he was not ready to reject entirely; and because, if the analogy to the negative community were absolute, he saw no way to exclude the public from taking as well as the land-owners.

It is not our object to enter this discussion as to natural gas, oil,

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[1] Brown *v.* Vandergrift, 80 Pa. St. 142, 147.

[2] Citing State *ex rel.* Corwin *v.* Indiana, etc., Co., 120 Ind. 575, 22 N. E. 778, 6 L. R. A. 579; People's Gas Co. *v.* Tyner, 131 Ind. 277, 31 N. E. 59, 31 Am. St. 433, 16 L. R. A. 443.

or percolating water; as we trust we have shown the settled view of the law toward running water (*aqua profluens*). Yet we would mention with regard to Mr. Justice White's two grounds of hesitation, that as to the first, the *cujus est solum* doctrine not only never has any bearing as to running water, but is being in contemporaneous cases rejected also as to percolating water;[1] while as to the second, the general public is excluded from the use of *running water* for the reason that, while its *corpus* is owned by no one, the taking thereof is confined to riparian proprietors because they, as the owners of the enclosing lands, alone have access to it, the lack of access excluding all non-riparian owners; following which all riparian proprietors, having equally the right of access, must exercise the resulting usufruct reasonably, with due regard to the rights of their neighbors on the stream.[2]

From Ohio Oil Co. *v.* Indiana, the term "mineral *ferae naturae*" is passing into the textbooks. For example, "Water, oil, and still more strongly gas, may be classed by themselves, and have been not inaptly termed *minerals ferae naturae*."[3]

This analogy to *running water* is finally shown by the authorities with which we close this topic. Just as wild animals, by capture becoming private property, are personalty, so likewise running water, severed from its natural wandering, and confined under private control in a reservoir, artificial watercourse, or other works of man that reduce it to possession, becomes personal property.

The individual particles of water, so impressed by diversion into

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[1] See recent cases collected in Wiel, Water Rights in the Western States, 2 ed., 578.

[2] We have set this forth at some length in Wiel, Water Rights in the Western States, Part II, Ch. II, and can here merely cite a few authorities to the effect that the riparian right to the use of a water course arises out of the exclusion of non-riparian owners because their lands have no access to the stream. Lyon *v.* Fishmongers Company, 1 App. Cas. 673; Embrey *v.* Owen, 6 Exch. 352; Cocker *v.* Cowper, 5 Tyrw. 103; Race *v.* Ward, 3 E & B. 710; Stockport W. W. *v.* Potter, 3 H. & C. 300; Lord *v.* Commissioners, 12 Moore P. C. 473; North Shore Ry. *v.* Pion, 14 App. Cas. 612; McCartney *v.* Londonderry Ry., [1904] A. C. 301 (per Lord Macnaghten); Nelson, J., in Howard *v.* Ingersoll, 13 How. (U. S.) 426, 14 L. Ed. 209; Haupt's Appeal, 125 Pa. St. 211, 17 Atl. 436, 3 L. R. A. 536; Gould *v.* Hudson, etc., Co., 6 N. Y. 542; Lux *v.* Haggin, 69 Cal. 255, 333, 413, 10 Pac. 674; Heilbron *v.* Fowler, etc., Co., 75 Cal. 426, 7 Am. St. 183, 17 Pac. 535; Lembeck *v.* Nye, 47 Oh. St. 336, 21 Am. St. 828, 836, 24 N. E. 686, 8 L. R. A. 578; City of Paterson *v.* East Jersey W. Co., 70 Atl. 472 (N. J. Eq.); Bigham Bros. *v.* Port Arthur, etc., Co., 91 S. W. 848, 97 S. W. 686 (Tex., Civ. App.); Lewis, Eminent Domain, §§ 78–82, and especially § 83.

[3] 21 Am. & Engl. Encyc. L. 417. See also 27 Cyc. 534.

a ditch and become *private property*, possess none of the characteristics of immovability that go with our conception of real estate; they are still always moving though privately possessed, having, as particles, the characteristics of personal property. The analogy to caged animals, snared birds, or fish in a net, shows well the point of view: the particles in the ditch, now private property, are personalty. This is the law, and is so laid down by Mr. Justice Stephen Field.[1] "Water, when collected in reservoirs or pipes, and thus separated from the original source of supply, is personal property, and is as much the subject of sale — an article of commerce — as ordinary goods and merchandise." This was said of the water in the same Spring Valley reservoirs as those involved in the Schottler case.[2] It was necessary to decide whether the Spring Valley Company, supplying San Francisco with water, was within a statute authorizing the formation of corporations for trade or commerce, and it was held that it was. The water so taken into an artificial structure is the subject of larceny at common law, as personal property,[3] and that water in an artificial watercourse or appliance is personal property is stated in numerous other authorities.[4]

It is important to appreciate the origin of this rule, deduced from the fundamental civil law principle that the *corpus* of the water in a natural stream is *not* property, real or personal, in any sense of the word, but is in the negative community, which absolutely excludes the common-law maxim, "*Cujus est solum ejus est usque ad caelum*," from any application to the water of running streams. It is not a transition of the particles from realty to personalty by severance from the freehold, like fixtures or emblements; it is the transition from *not* property (neither real nor personal) to *private property*, by severance from the natural stream; from particles wandering "wild" to particles "captured" by diversion and reduced to private possession and control.[5]

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[1] Heyneman *v.* Blake, 19 Cal. 579, cited by him with approval in the Schottler opinion, p. 205, *supra*.

[2] Quoted, p. 205, *supra*.

[3] Fallon *v.* O'Brien, 11 Q. B. D. 21. Wild animals are not property in a natural state, and not the subject of larceny; but when brought into possession by being caught in a trap, they are then the subject of larceny as chattels. 25 Cyc. 17, article "Larceny," by Professor J. H. Beale.

[4] Beatty, J., in Riverside Co. *v.* Gage, 89 Cal. 418, 26 Pac. 889; Ball *v.* Kehl, 95 Cal. 613, 30 Pac. 780; Parks Canal Co. *v.* Hoyt, 57 Cal. 44; Dunsmuir *v.* Port Angeles Co., 24 Wash. 114, 63 Pac. 1095; Farnham, Waters, 462.

[5] *Cf.* Stanislaus W. Co. *v.* Bachman, 152 Cal. 716, 93 Pac. 858, in which case the point was not, however, at all involved.

IV. Application of these Principles.

With regard to the practical application of the principle that the *corpus* of water severed from the stream in an artificial conduit or structure is personal property, the only difficulty is the danger that it may be given undue importance. Its value lies mostly in rounding out and thus re-enforcing the exceedingly important fundamental idea that the water in the stream itself is not property at all, and that one may have only the strictly usufructuary right to use the stream; as being merely one illustration of the fundamental distinction between the water itself and the right to have its continual flow and use. Were the principle to be, to any great extent, so applied as to regard cases as based upon property rights in running water as a substance it would be a perversion, for its true force lies in showing the opposite — that controversies must, as a rule, be decided with regard to the use of water, and not to its *corpus*. As was said by the California court:[1] "This court has never departed from the doctrine that running water, so long as it continues to flow in its natural course, is not, and cannot be made the subject of private ownership. A right may be acquired to its use, which will be regarded and protected as property; but it has been distinctly declared in several cases that this right carries with it no specific property in the water itself. We are not called upon (and courts seldom are) to determine the character of the property which the owner of a ditch has in the water actually diverted by and flowing in his ditch. With reference to such water, his power of control and right of enjoyment are exclusive and absolute, and *it is a matter of little practical importance whether, in a strict legal sense, it be or be not private property*. In regard to the water of the stream, his rights (an appropriator's), like those of a riparian owner, are strictly *usufructuary*, and the rules of law by which they are governed are perfectly well settled."

We will try to illustrate this. Where a contract has in view a natural stream, only the usufructuary water right can be its subject matter, as that alone constitutes private property. But where it concerns water in a ditch or pipe, etc., the *corpus* of water therein is now property which may also be the subject of contract. It then becomes a question of construction — of intention — whether, in the latter case, the parties contracted with a view to the sub-

[1] Cope, J., in Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472.

stance itself, or with a view to the "water right" in the stream from which the supply was drawn. A contract with a house supply company in a city is the typical case where the substance itself is the subject of the contract; and such a case is one of the sale of personal property.[1] But the situation in regard to irrigation or water power contracts is different. Granting that water in a reservoir, pipe, ditch, or other artificial receptacle is personal property, yet water power, or irrigation, or similar contracts and litigation deal with the water right, and not with any identifiable or specific particles of liquid or "very body of water" in the ditch. Title to any specific particle or particles of the liquid seldom becomes the subject of litigation, or contract, since irrigators or mill-owners invariably *mean* to contract concerning the water right, its flow and use. The contrary situation arises only in exceptional cases, as where one is prosecuted for larceny in taking water from a ditch or pipe,[2] in which case title to the specific particles stolen is involved, that is, specific particles of personal property.

If one artificially manufactures water from oxygen and hydrogen, and leads it into a ditch from the factory to a bottling works, and contracts with me about the water in the ditch, it is a contract concerning personalty; in that case there is no "water right" involved at all. If one has a spring of medicinal waters and collects the water in a reservoir preparatory to bottling, and contracts to sell *one reservoir full*, it would be a sale of personal property. Likewise, if he sells me so many gallons from the reservoir measured by a meter. The specific particles sold could be marked and set aside (by closing the reservoir and coloring the water red, for example). The very body of water in the reservoir at the time of purchase may have peculiar mineral properties not again occurring, so that the purchaser desires just that very water. But if he buys the right to have the mineral water flow from the spring, he contracts concerning the water right, concerning realty and not personalty. A city supply water company sells the householder so many gal-

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[1] Heyneman *v.* Blake, 19 Cal. 595, Field, J., quoted *supra*, p. 209; Spring Valley W. W. *v.* Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48 quoted *supra*, p. 205; Hesperia, etc., Co. *v.* Gardiner, 4 Cal. App. 357, 88 Pac. 286. In Carothers *v.* Philadelphia Co., 118 Pa. St. 468, 12 Atl. 314, the court compares gas companies (with which the case dealt) with city supply water companies, and says: "They produce, store, and supply to consumers water. Transportation by means of pipes is the means of delivery, and is a mere incident of the business."

[2] Fallon *v.* O'Brien, 11 Q. B. D. 21.

lons or cubic feet of liquid measured by a meter; it does not profess to grant a perpetual flow from a natural stream.

To give security to irrigators, irrigation contracts are generally viewed as having for their subject-matter the usufructuary right in the stream through the intermediate agency of the ditch, thereby making them contracts affecting real property, — the ditch and the water right in the stream from which the ditch heads. A contract granting a right to take water from a ditch for irrigation is held to grant a servitude upon real property, upon the canal and water rights of the grantor.[1] And the arid states have settled it as a fixed rule aside from contract that one who has a right to take water from a company's ditch is an appropriator from the natural stream through the intermediate agency of the ditch.[2] Rights for irrigation in the flow in a ditch thus relate back to the rights in the stream, and contracts refer back to the same subject-matter when concerning irrigation; though the distinction between the *corpus* of water and its use and flow would still prevail in such matters as larceny from a ditch, or contracts for house supply in cities, as previously mentioned.

When there is a contract for irrigation or mill power, it thus becomes a contract for flow and use from a natural stream (a usufruct) and not a contract concerning the *corpus*, or particles (even though they be personalty), such as a contract for a single ditchful of water would have been. It enforces the principle that "Whenever any corporation furnishes water to irrigate lands . . . the right to *flow and use* of said water is and shall remain a perpetual easement to the land."[3] Irrigation contracts with irrigation companies have for their subject-matter the usufruct in the stream (and not the water itself) through the intermediate agency of the

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[1] Dorris *v.* Sullivan, 90 Cal. 279, 27 Pac. 216; Stanislaus Water Co. *v.* Bachman, 152 Cal. 716, 93 Pac. 858; South Pasadena *v.* Pasadena Co., 152 Cal. 579, 93 Pac. 490; Graham *v.* Pasadena, 152 Cal. 596, 93 Pac. 498; Orcutt *v.* Pasadena, 152 Cal. 599, 93 Pac. 497; Fudickar *v.* East Riverside Co., 109 Cal. 29, 41 Pac. 1024; Farmers', etc., Co. *v.* New Hampshire, etc., Co., 92 Pac. 290 (Col.).

[2] Wheeler *v.* Irrigation Co., 10 Col. 582, 3 Am. St. 603, 17 Pac. 487; Combs *v.* Ditch Co., 17 Col. 146, 31 Am. St. 275, 28 Pac. 966; Wyatt *v.* Larrimer, etc., Co., 18 Col. 298, 36 Am. St. 280, 33 Pac. 144; Hard *v.* Boise, etc., Co., 9 Idaho, 589, 76 Pac. 331, 65 L. R. A. 407; Gould *v.* Maricopa, etc., Co., 8 Ariz. 529, 76 Pac. 598. In the Wyatt case it is said: "The consumer under the ditch possesses a like property. He is an appropriator from the natural stream through the intermediate agency of the ditch, and has the right to have the quantity of water so appropriated flow in the natural stream and through the ditch for his use."

[3] Cal. Civ. Code, § 552; Cal. Stat. 1885, 95, § 11½, as amended Stat. 1897, p. 49.

ditch, affecting the water right in the stream from which the ditch heads. So far as the water in the canal is personalty, it is personalty of the consumers as well as of the company, the company being chiefly the agent of the consumers to make the diversion and carry the water. The company is, in the decisions of the arid states, universally denominated simply "a carrier."

Another illustration is the rule that the landowner cannot claim riparian rights in an artificial canal crossing his land, because the *corpus* of the water therein is not *publici juris*, but is the private property of the canal owner. Still another illustration is the decision that the measure of damages for diversion of a natural stream is not the value of the water diverted at so much per inch or gallon as for goods sold and delivered.[1]

V. CONCLUSION.

We have attempted to show the truth of the following three "first principles" of the law of running waters: (1) Running water in a natural stream is not the subject of property, but is a wandering, changing thing without an owner, like the very fish swimming in it, or like wild animals, the air in the atmosphere, and the negative community in general. (2) With respect to this substance the law recognizes a right to take and use of it, and to have it flow to the taker so that it may be taken and used, — a usufructuary right. (3) When taken from its natural stream, so much of the substance as is actually taken is captured, and, passing under private possession and control, becomes private property during the period of possession.[2]

Samuel C. Wiel.

SAN FRANCISCO.

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[1] Parks Canal Co. *v.* Hoyt, 57 Cal. 44.

[2] We gather in a note some of the authorities bearing upon these principles:

CIVIL LAW. — 2 Inst., tit. 1, § 1; 4 Puffendorff, c. 5, § 2; 3 *ibid.*, c. 3, §§ 3, 4; 1 Vattel, Law of Nations, 20; Nicasius, lib. 2, tit. 1, 89 b; Domat, Civil Law, § 416; Azo, see 8 Pub. Selden Society; Vinnius, quoted in Mason *v.* Hill, 5 B. & Ad. 1; Grotius, c. 2, s. 12; Boyer, Commentaries on the Civil Law, 61; 2 Aubry *et* Rau, Droit Civile Français, 4 ed., 34, 35; Code Napoleon, Art. 644 *et seq.*; Hall, Mexican Law, § 1392; Esriche, Aquas, and other Mexican authorities given in Lux *v.* Haggin, 69 Cal. 255, 315, 10 Pac. 674; Febrero Novissimo, T. 1, lib. 2, tit. 1 (rain water); Louisiana Code, Art. 657 *et seq.*

ENGLISH. — 2 Bracton, f. 7, § 5; Fleta, lib. 3, cap. 1, s. 4 (omits Aqua Profluens. Likewise 2 Britton, c. 2, § 1); Callis, Sewers, orig., ed., 78, quoted by counsel in 9 C. B. N.S. 587; 2 Bl. Com. c. 25, pp. 14, 395; Shury *v.* Piggott, Poph. 169; Magistrates *v.* Elphinstone, 3 Kames Dec. 331 (Scotch); Brown *v.* Best, 1 Wils. C. P. 174;

Williams *v.* Moreland, 2 B. & C. 910; Liggins *v.* Inge, 7 Bing. 692; Manning *v.* Wasdale, 5 A. & E. 758, 762; Wright *v.* Howard, 1 Sim. & St. 190; Mason *v.* Hill, 5 B. & Ad. 1; Wood *v.* Waud, 3 Exch. 748; Embrey *v.* Owen, 6 Exch. 352; Dickinson *v.* Canal Co., 7 Exch. 301; Race *v.* Ward, 3 E. & B. 710; Young *v.* Hichens, 6 Q. B. 606; Medway Co. *v.* Romney, 9 C. B. N. S. 586 (Earle, C. J.); Lyon *v.* Fishmongers Co., 1 App. Cas. 673; Fallon *v.* O'Brien, 11 Q. B. D. 21; White *v.* White, [1906] A. C. 83.

UNITED STATES AND FEDERAL. — Howard *v.* Ingersoll, Nelson, J., 13 How. (U. S.) 426, 14 L. Ed. 189; Spring Valley W. W. *v.* Schottler (Field, J.), 110 U. S. 373, 4 Sup. Ct. Rep. 48, 28 L. Ed. 183; Ohio Oil Co. *v.* Indiana, 177 U. S. 190, 20 Sup. Ct. Rep. 576, 44 L. Ed. 729; Slack *v.* Walcott, 3 Mas. (U. S.) 508, Fed. Cas. No. 12932 (Story, J.); Tyler *v.* Wilkinson, 4 Mas. (U. S.) 397, Fed. Cas. No. 14312 (Story, J.); Webb *v.* Portland Cement Co., 3 Sumn. (U. S.) 189, Fed. Cas. No. 17322 (Story, J.); Mohl *v.* Lamar Canal Co., 128 Fed. 776; United States *v.* Conrad Inv. Co., 156 Fed. 127. *California:* Eddy *v.* Simpson, 3 Cal. 249, 58 Am. Dec. 408; Hill *v.* Newman, 5 Cal. 445, 63 Am. Dec. 140; Conger *v.* Weaver, 6 Cal. 548, 65 Am. Dec. 528; Crandall *v.* Woods, 8 Cal. 136; Hill *v.* King, 8 Cal. 336; Kidd *v.* Laird, 15 Cal. 161, 76 Am. Dec. 472; Heyneman *v.* Blake, 19 Cal. 579: McDonald *v.* Askew, 29 Cal. 200; Nevada, etc., Co. *v.* Kidd, 37 Cal. 282; Hanson *v.* McCue, 42 Cal. 308, 10 Am. St. 299; Los Angeles *v.* Baldwin, 53 Cal. 469; Pope *v.* Kinman, 54 Cal. 3; Parks Canal Co. *v.* Hoyt, 57 Cal. 44; Lux *v.* Haggin, 69 Cal. 255, at 390, 10 Pac. 674; Swift *v.* Goodrich, 70 Cal. 103, 11 Pac. 561; Green *v.* Carotta, 72 Cal. 267, 13 Pac. 865; Riverside Co. *v.* Gage, 89 Cal. 410, 26 Pac. 889; Ball *v.* Kehl, 95 Cal. 613, 30 Pac. 780; Vernon Irr. Co. *v.* Los Angeles, 106 Cal. 237, 39 Pac. 762; McGuire *v.* Brown, 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Hargrave *v.* Cook, 108 Cal. 72, 41 Pac. 18, 30 L. R. A. 390; Smith *v.* Green, 109 Cal. 229, 41 Pac. 1022; People *v.* Truckee, etc., Co., 116 Cal. 397, 58 Am. St. 183, 48 Pac. 374, 39 L. R. A. 581; Gould *v.* Eaton, 117 Cal. 542, 49 Pac. 577, 38 L. R. A. 181; Katz *v.* Walkinshaw, 141 Cal. 116, 99 Am. St. 35, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236 (Shaw, J.); Calkins *v.* Sorosis Co., 150 Cal. 431, 88 Pac. 1094; Duckworth *v.* Watsonville Co., 150 Cal. 520, 89 Pac. 338; Hesperia, etc., Co. *v.* Gardiner, 4 Cal. App. 357, 88 Pac. 286; Stanislaus W. Co. *v.* Bachman, 152 Cal. 716, 93 Pac. 858. *Colorado:* Saint *v.* Guerrerio, 17 Col. 448, 31 Am. St. 320, 30 Pac. 335. *Connecticut:* Mitchell *v.* Warner, 5 Conn. 519. *Idaho:* Boise, etc., Co. *v.* Stewart, 10 Idaho 38, 77 Pac. 25, 321. *Indiana:* People's Gas Co. *v.* Tyner, 131 Ind. 277, 31 Am. St. 433, 16 L. R. A. 443, 31 N. E. 59. *Maine:* Davis *v.* Getchell, 50 Me. 604, 79 Am. Dec. 636. *Massachusetts:* Cary *v.* Daniels, 8 Met. (Mass.) 466, 41 Am. Dec. 532 (Shaw, C. J.); Elliott *v.* Fitchburg Ry., 10 Cush. (Mass.) 191, 57 Am. Dec. 85 (Shaw, C. J.). *Nebraska:* Crawford *v.* Hathaway, 67 Neb. 325, 108 Am. St. 647, 93 N. W. 781, 60 L. R. A. 889. *Nevada:* Stat. 1907, p. 30, § 3. See Van Sickle *v.* Haines, 7 Nev. 249. *New Hampshire:* Roberts *v.* Claremont Co., 66 Atl. 485. *New Jersey:* Worthern *v.* White, etc., Co., 70 Atl. 471 (N. J. Eq.); City of Paterson *v.* East Jersey W. Co., 70 Atl. 472 (N. J. Eq.). *New York:* Pollitt *v.* Long, 58 Barb. (N. Y.) 20; Partridge *v.* Eaton, 3 Hun (N. Y.), 533, 534; Pixley *v.* Clark, 35 N. Y. 520, 91 Am. Dec. 72; Sweet *v.* City of Syracuse, 129 N. Y. 316, 27 N. E. 1081, 29 N. E. 289; City of Syracuse *v.* Stacey, 169 N. Y. 231, 245, 62 N. E. 354; Wyandonch Club *v.* Davis, 33 App. Div. 598, 53 N. Y. Supp. 993; *In re* Board of Water Supply, 109 N. Y. Supp. 1036. *Ohio:* Walker *v.* Board of Works, 16 Oh. 540; Pollok *v.* Cleveland, etc., Co., 56 Oh. St. 655, 47 N. E. 582. *Pennsylvania:* Haupt's Appeal, 125 Pa. St. 211, 17 Atl. 436, 3 L. R. A. 536; Mayor *v.* Commissioners, 7 Pa. St. 363; Lord *v.* Meadville W. Co., 135 Pa. St. 122, 20 Am. St. 864, 8 L. R. A. 202, 19 Atl. 1007; Wilkes Barre Co. *v.* Lehigh Co., 3 Kulp. (Pa.) 389; Clark *v.* Pa. Ry., 145 Pa. St. 438, 27 Am. St. 710, 22 Atl. 990; Brown *v.* Vandergrift, 80 Pa. St. 142, 147; West Moreland Co. *v.* DeWitt, 130 Pa. 235, 18 Atl. 724, 5 L. R. A. 731; Jones *v.* Forest Oil

Co., 194 Pa. St. 379, 44 Atl. 1074, 48 L. R. A. 748. *South Carolina:* Pugh *v.* Wheeler, 2 Dev. & B. (S. C.) 55. *Utah:* Bear Lake Co. *v.* Ogden, 8 Utah 494, 33 Pac. 135; Salt Lake City *v.* Salt Lake Co., 24 Utah, 249, 67 Pac. 672, 61 L. R. A. 648, 25 Utah 456, 71 Pac. 1069. *Wyoming:* Willey *v.* Decker, 11 Wyo. 496, 100 Am. St. 939, 73 Pac. 210.

TEXTBOOKS. — Kent, Commentaries, Part V, § 35; Kent, Commentaries, 3 Com. Marg. 439; Washburn, Easements, 207; Pomeroy, Riparian Rights, § 55; Gould, Waters, 3 ed., § 236; Farnham, Waters, 462; Goodwin, Real Property, 2; Kinney, Irrigation, 398; Kerr, Injunctions, 4 ed., 179; Kerr, Real Property, § 111; 27 Cyc. 534; 29 Cyc. 334; 5 Am. & Eng. Encyc. L. 113; 21 Am. & Eng. Encyc. L. 417.